Province of Manitoba.

QUEEN'S BENCH.

Killam, J.] HUTCHINSON *v.* COLBY. [Sept. 27.

Appeal from County Court—Practice—Abandonment of right to appeal—"Amount in question" in appeal.

Motion on behalf of plaintiff to strike out an appeal by defendant to the full court from an order of a County Court judge, dismissing a summons to set aside the writ of attachment issued in this action.

Plaintiff sued to recover $70.70, and issued a writ of attachment. Defendant took out a summons to set aside the writ of attachment, which summons was dismissed by the County Court judge on July 23rd, 1898. No order was then taken out, and the case went to trial, when judgment was entered for plaintiff for $47.70. This, bowever, was set aside on defendants' application, and a new trial granted, when judgment was entered for plaintiff for $65.70. Defendant, before the second trial, took out the order dismissing the application to set aside the writ of attachment, and appealed therefrom to the full court, when plaintiff moved before a judge to strike out the appeal on the following ground: That the defendant was estopped from appealing by reason of her proceeding with the trial of the action after the order dismissing the summons was made, by calling and examining witnesses and by applying for a new trial after the order had been made. That defendant acted on the order by issuing and taking out the same; by proceeding with a new trial and calling and examining witnesses; that defendant abandoned the order by neglecting to serve same upon the plaintiff or his solicitor within a reasonable time. That at the time the defendant commenced her proceedings in appeal the amount in question did not exceed the sum of $50, and the appeal should have been to a single judge.

Held, that the motion should be dismissed with costs, to be costs to the defendant upon the appeal in any event of the appeal. It could not be said that the defendant had acted on the order. She was throughout defending herself against the whole proceeding. The judge's decision was against her contention that the attachment should not have issued. The time for the trial had been fixed before the application to set aside the attachment was disposed of, but even if it had not, and if the defendant had sought afterwards to speed the trial in order to get rid of the attachment, it should not be considered that she was acting upon the order dismissing her application. It could not be said that she abandoned the order by not serving it. The order was against her and she could not abandon it. As to whether the appeal should have been to the full court or a single judge, so far as there can be said to have been an amount in question on the application to set aside the attachment, it was more han $50 when that application was pending, and it did not appear that this was altered by a judgment for a less amount which had been set aside when the appeal was entered.

Leech, for plaintiff. *Bonnar*, for defendant.